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No. 88-929

IN THE

Supreme Court of the United States

October Term, 1988

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Second Circuit ignored the plain meaning of Section 404(c) of the Clean Water Act by allowing the Environmental Protection Agency to exceed its statutory authority when it vetoed a fill permit on the basis of the state or condition of wetlands regionally or nationwide rather than basing its decision on the environmental effects solely at the specific proposed site in question as required by Section 404(c) and as Congress intended?

LIST OF PARTIES

Petitioners, Joseph Robichaud and Citizens in Support of Attleboro Mall, intervened as plaintiffs-appellants below. Government respondents, United States Environmental Protection Agency, United States Army Corps of Engineers, Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency, Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency, were defendants-appellees below. Respondents, Sierra Club, Environmental Defense Fund, National Wildlife Federation, National Audubon Society, Conservation Law Foundation of New England, Inc., Massachusetts Audubon Society, Citizens for Responsible Environmental Management, Massachusetts Society for Conservation Professionals, Audubon Society of Rhode Island, Rhode Island Association of Conservation Commissioners and Natural Resources Defense Council intervened as defendants-appellees on behalf of government respondents in the courts below.

The Home Building Association of Massachusetts intervened on behalf of respondents Bersani, *et al.*, in the district court but did not appear as a party in the Second Circuit.

Respondents John A. Bersani, Newport Galleria Group, Robert J. Congel, and the Pyramid Companies were plaintiffs-appellants below and have filed a separate petition for writ of certiorari in this Court on the same day as this petition was filed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Joseph Robichaud and Citizens in Support of Attleboro Mall, who were intervenor-appellants below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on June 8, 1988, rehearing and suggestion for rehearing *en banc* denied, September 2, 1988. Petitioners also support the petition for certiorari filed by respondents John A. Bersani, *et al.*, and suggest that these two petitions be consolidated.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, with the dissenting opinion of Judge Pratt, is reported at 850 F.2d 36 (2d Cir. 1988), and reproduced in the Appendix annexed to the Petition for Writ of Certiorari filed by John A. Bersani, *et al.*, who were the appellants below. App. A. The Order of the United States Court of Appeals for the Second Circuit, denying Petitioners' Petition for a Rehearing and Suggestion for Rehearing En Banc, dated September 2, 1988, is not reported and is reproduced in Respondent Bersani's Petition as App. D at 109a. The opinion of the United States District Court for the Northern District of New York, is reported at 674 F. Supp. 405 (N.D.N.Y. 1987) and reproduced as App.

B at 32a. The Final Determination of the Assistant Administrator for External Affairs, United States Environmental Protection Agency, Concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to Section 404(a) of the Clean Water Act ("Final Determination"), dated May 13, 1986, is not reported but is reproduced as App. C at 64a.

JURISDICTION

The date of the opinion sought to be reviewed was June 8, 1988. The Second Circuit denied Petitioners' petition for rehearing on September 2, 1988. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provision, Section 404 of the Clean Water Act ("the Act"), 33 U.S.C. 1344, and regulatory provision, 40 C.F.R. 230.10(a), are reproduced in the Appendix as App. E to the petition for certiorari filed by John A. Bersani, *et al.*

STATEMENT OF THE CASE

In the interest of judicial economy, petitioners adopt by reference the Statement of the Case set forth in the petition for writ of certiorari filed by respondents John A. Bersani, *et al.*, on whose behalf petitioners intervened below. Nevertheless,

petitioners wish to emphasize certain facts as they relate to the question presented.

John A. Bersani and The Pyramid Companies ("Pyramid") propose to build a shopping mall in Attleboro, Massachusetts on land which they own. As the administrative record demonstrates, the proposed shopping center would be a significant economic boon for the citizens of Attleboro and the economically depressed region. It would create 1,500 construction jobs and some 2,250 permanent part-time and full-time jobs. Over $500,000 in municipal tax revenues would be generated each year and some $25,000,000 would be added to the regional economy annually. This mall is enthusiastically supported by the overwhelming majority of the citizens of Attleboro, whose views in this case are represented by petitioners Citizens in Support of Attleboro Mall and its Chairman Joseph Robichaud.

Not only would the mall provide a much needed economic stimulus to Attleboro and the region, the proposed project would also enhance the aesthetics of the area by filling in 32 acres of Sweedens Swamp, the proposed site of the mall, and *enhancing* 13 additional acres of the swamp. Four acres of the swamp will be left undisturbed. Nine acres of upland will be excavated to create wetlands on site. *See* District Court opinion at App. 38a.

As petitioners and other residents of Attleboro have long known, Sweedens Swamp is a wetland in name only, classified that way only because of the presence of some red maple trees. In point of fact, the so-called "wetlands" is dry most of the year. The swamp is highly degraded, the victim of years of unauthorized, illegal dumping of solid waste. The swamp is *isolated* and neither feeds into any other stream or river, nor connects to any other wetland. A walking tour of the swamp reveals a burial ground for animals, decaying tires,

refrigerators, roofing shingles and other debris. *See* District Court Opinion at App. 42a. To the residents of Attleboro, who have complained about the swamp for years, Sweedens Swamp is a degraded eyesore, nothing more than a breeding ground for mosquitoes and of use only to the teenagers who go there to drive dirt bikes, drink, and experiment with drugs. In sum, Sweedens Swamp as it presently exists is a highly degraded, highly inefficient wetlands which fails to perform most of the ecological or recreation benefits which make wetlands worth preserving.

In addition to extensive on-site mitigation, Pyramid informed the U.S. Army Corps of Engineers, the permitting authority, that it would construct over 35 acres of diverse, productive wetlands on an off-site parcel of land which presently is of very low ecological value. Thus, in addition to improving the wildlife habitat which will be provided in the 26 acres of enhanced wetland which will remain after construction, Pyramid has agreed to create an *additional* 36 acres of wildlife habitation consisting of open water, marsh meadow, and shrub swamp. The off-site wetlands to be created by Pyramid will cost the company several million dollars to construct. Pyramid has agreed to post a performance bond, and if required by EPA, would construct the off-site wetlands *before* undertaking to build the mall. EPA Final Decision at App. 100a-101a.

The Corps found that Pyramid's off-site wetlands creation plans would result in a substantial improvement in overall wildlife habitat for the area. The Corps noted that Sweedens Swamp is a red maple swamp, a very common wildlife habitat in Massachusetts. By contrast, the open water, marsh meadows and shrub swamp to be created by Pyramid is a relatively rare type of habitat in the Northeast. As a result, the off-site wetlands will attract animals whose presence in Massachusetts is limited severely by available habitat.

On balance, after exhaustively analyzing the degraded state of Sweedens Swamp and the millions of dollars of improvements to be made by Pyramid, both on-site and off-site, the Corps finally concluded that Pyramid's purported project would result in a net *benefit* to the environment by an order of magnitude of 1 1/2 to 1. The Corps found that Pyramid's proposal would result in a more efficient, functioning wetlands that would actually clean the water entering it, provide meaningful fisheries habitat, and provide for rarer and more endangered wildlife.

Nevertheless, the Administrator of the Environmental Protection Agency, acting through the Assistant Administrator for External Affairs, issued a Final Determination, the effect of which was to veto the proposed fill permit which the U.S. Army Corps of Engineers had carefully decided to issue to the developer. The purported basis for this veto was the EPA's determination that filling in the swamp would cause "unacceptable adverse effects" to the wildlife habitat at Sweedens Swamp.

While parroting the conclusory statutory language of Section 404(c) ("unacceptable adverse effects") in exercising its veto power, the EPA's basis or supporting reason for reaching that conclusion reveals that an important factor in its decision was the state or condition of wetlands other than at the site in question, namely, Sweedens Swamp. However, Congress limited the EPA's veto authority by requiring that it assess the environmental effects only at the site in question, rather than considering the condition of wetlands regionally or nationally.

The court of appeals essentially ignored this argument and merely stated without any explication in footnote one of its decision that the "EPA's decision as wholly within its authority." App. 5a, n.1.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT IGNORED THE PLAIN MEANING OF SECTION 404(C) OF THE CLEAN WATER ACT WHICH LIMITS THE EPA'S AUTHORITY TO DENY A FILL PERMIT ON THE BASIS OF THE ENVIRONMENTAL EFFECTS OF A DISCHARGE AT THE PROPOSED SITE IN QUESTION RATHER THAN AT UNRELATED SITES, THEREBY VIOLATING BASIC RULES OF STATUTORY CONSTRUCTION AND CONCOMITANTLY, ALLOWING THE EPA TO EXCEED ITS STATUTORY AUTHORITY.

It is undisputed that the EPA denied the permit in question to the developer to fill in his own property to build a shopping mall at Sweedens Swamp on essentially two grounds. The EPA Assistant Administrator determined that because of:

> [1] the avoidability of the loss [of wildlife habitat] and[2] the *significance of such areas in Massachusetts, I conclude that filling Sweedens Swamp to build the proposed mall would have unacceptable adverse effects* within the meaning of Section 404(c).

EPA Final Decision at App. 107a. (emphasis added). It is also undisputed that EPA expressly regarded the alleged cumulative impact of losses at other unrelated wetland sites far away Sweedens Swamp as an "important" factor in denying the permit. *Id* at 106a. The Second Circuit, however, only addressede the first reason offered by the EPA for its veto of the permit and all but ignored the substantial arguments raised by petitioners as to why the EPA's consideration of the historical and cumulative losses of wetlands at other sites in Massachusetts and

around the country is contrary to the plain meaning of Section 404(c), 33 U.S.C. 1344(c). Consequently, the EPA acted "in excess of statutory jurisdiction, authority, and limitations ...." and its decision should have been set aside. 5 U.S.C. 706(2)(C). [1]

The lower court correctly noted in its decision that Section 404(c), 33 U.S.C. 1344(c) "is at the heart of the instant case." App. at 8a. That section, reproduced in footnote 3 of the panel's decision, App. 8a, states in pertinent part that the EPA administrator has the authority to deny or restrict the use of any *defined area*...as a disposal site, whenever he determines...that the discharge of such materials into *such area* will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas...wildlife, or recreational areas. (emphasis added).

Congress could not have made it clearer that by using the terms "defined area" and "such area," it intended that the EPA consider the environmental impacts of the discharge only at the site in question. The "defined area" has been defined as 49 acres of Sweedens Swamp. The term "such area" clearly

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1 The panel, in footnote one of its decision, simply restated petitioners' statutory authority issue and held without any explanation "that EPA's decision was wholly within its authority...." App. 5a, n.1. As for petitioners' second argument, that the EPA's rejection of the developers mitigation efforts was "arbitrary and capricious" under 5 U.S.C. 706(2)(A), the panel at least gave a curt reason for its conclusion stating only that the EPA had a basis to believe that the mitigation efforts "were not likely to succeed." *Id.* While petitioners maintain that the lower court neglected to further determine whether the EPA's assignment of a *zero* chance of success to the mitigation efforts was arbitrary, especially in light of the fact that the developer offered to undertake the mitigation efforts *before* he began filling the swamp, we will nevertheless focus our petition on our first issue, *i.e.*, the lower court's failure to apply the plain meaning of the statute, since that is the more egregious error.

references the term "defined area." Accordingly, the Congress clearly *limited* the authority of the EPA to considering the environmental impacts at the site in question, rather than leaving it with open-ended and uncabined discretion to deny a permit simply because in its view, enough wetlands have been filled already at the national or regional level.

At oral argument before the Second Circuit, Judge William H. Timbers, who wrote the opinion, disparaged petitioners' argument that the EPA's authority is limited by the language Congress chose, characterizing it as a basic "law school" type argument, and one that he rejected in an earlier opinion he wrote but which he could not recall. To a certain extent, the other members of the panel similarly indicated at oral argument their belief that the EPA need not wear "blinders" and limit their assessment of the environmental impact to the site in question. Presumably, these views informed the court's unadorned and unexplained conclusion that the EPA "was wholly within its authority" in considering the cumulative impacts of *other* sites, rather than the site in question. App. 5a, n.1. This conclusion is clearly wrong and violates basic rules of statutory construction as enunciated by this Court on numerous occasions and even as recognized by Second Circuit in a major opinion written by Judge Timbers himself. This grave error must be corrected because it goes to the fundamental principles of separation of powers and the role of the federal courts in a democratic society, *i.e.*, whether courts are competent to make law and policy or whether that role is reserved wholly to the Congress.

As the Supreme Court stated in the leading case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984):

> When a court reviews an agency's constuction of the statute which it administers, it is confronted with two

> questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, *that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress*....[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court [then, and only then] is whether the agency's answer [or reason for its decision] is based on a permissible construction of the statute.

Id. at 842-43 (emphasis added). The unambiguously expressed intent of the Congress in Section 404(c) is that the EPA administrator is limited to considering the impacts of the discharge at "such areas" which refers to the "defined areas," namely Sweedens Swamp. [2] If Congress wanted the EPA to consider the impact of discharges at other areas, Congress would not have used site-specific language. Since Congress *did* expressly address the issue, "that is the end of the matter" and neither the agency nor the lower court was free to re-write the statute. Consequently, there is simply no need to defer to the agency's expertise in deciding whether its construction of an ambiguous statute or one with "gaps" is a reasonable one.

While it may seem to the agency or the court below that EPA's consideration of the impact at other sites is a "reasonable" one as a *policy* matter, that is not the issue. The

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2 *See also Middle South Energy, Inc. v. F.E.R.C.*, 747 F.2d 763 (D.C. Cir. 1984) where Judge Bork stated that "[p]rima facie, the use of the iterative adjective 'such' indicates that this language is understandable only by reference to the sole prior reference in" the particular statutory provision under review." *Id.* at 768. In that case, the court held that the regulatory agency lacked authority to veto or suspend initial rate filings by the company for the sale of electricity.

question is whether it is a "reasonable" interpretation *of the statute*, not whether it is "reasonable" as a general policy matter. The Clean Water Act is not a Wetlands Protection Act. Since the statute is clear, EPA's recourse is to Congress if it feels that it needs additional authority in administering the CWA. As the Supreme Court concluded in *Chevron*, "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Id.* at 866 *citing TVA v. Hill*, 437 U.S. 153, 195 (1978).

The leading case in the Second Circuit for this proposition is an opinion written by Circuit Judge Timbers in *Manchester Environmental Coalition v. Environmental Protection Agency*, 612 F.2d 56 (2d Cir. 1979). In a unanimous opinion, the court struck down the EPA's interpretation of a provision of the Clean Air Act, 42 U.S.C. 7410(a)(5)(A)(iii) in language that is equally applicable here:

> In short, none of the arguments advanced by the EPA is sufficient to overcome the clear import of the statutory language itself. As the Supreme Court stated in *TVA v. Hill*, 437 U.S. 153 (1978), *courts should not "ignore the ordinary meaning of [the] plain language" of the statute, even though effectuating that meaning may have undesirable public policy ramifications*. *Id.* at 173. In the instant case, for us to approve the EPA's construction of the proviso in question would be to preempt congressional action by judicially decreeing what "'accords with some modicum of common sense and the public weal.'" *Id.* at 194. We decline to do so.

Id. at 60 (Timbers, J.) (emphasis added). This admonition has, until the instant case, been consistently followed by the Second Circuit in its other decisions. *See, e.g., United States v. Perdue*

Farms, Inc., 680 F.2d 277, 285 (2d Cir. 1982) (literal reading of statute must be followed and "inequitable" results or "alleged drafting errors[s] are for Congress, not the courts, to resolve"); *State of Connecticut v. EPA*, 696 F.2d 147, 156 (2d Cir. 1982) (opinion by Timbers, J.) ("agency does not have carte blanche ... to interpret regulations or standards to achieve desired result;...proper course ... would be to amend" regulations); *McMahon v. Califano*, 605 F.2d 49, 52 (2d Cir. 1979) (opinion by Timbers, J.) (court will not look behind "plain meaning" of statute).

Other circuits have followed these fundamental principles of statutory construction as well. *See, e.g., Transbrasil S.A. Linhas v. Dep't of Transp.*, 791 F.2d 202, 206-07 (D.C. Cir. 1986) (striking down the FAA's limits on number of flights by carrier to abate noise, stating that when "statute's language and history indicate a clear congressional intent, the court may end its journey and deplane without ever reaching the issue of the extent of deference to be accorded the agency's interpretation") (opinion by Wald, J.); *Moore v. Harris*, 623 F.2d 908, 918 (4th Cir. 1980) (no ambiguity in statute; therefore, recourse to agency interpretation is improper).

Needless to say, this Court has not hesitated to overturn lower court decisions that depart from the basic rules of statutory construction. For example, in *Amoco Production Co. v. Village of Gambell, Alaska*, 107 S. Ct. 1396 (1987), this Court reversed a Ninth Circuit decision that enjoined the sale of oil leases on the Outer Continental Shelf (OCS) off Alaska. In so doing, this Court looked at the language of the statute restricting the sale of oil leases "in Alaska" and concluded that the OCS is not "in Alaska." It rejected the Ninth Circuit's opinion that the term "in Alaska" should be construed "in a general, 'nontechnical' sense to mean the geographic region of Alaska, including the Outer Continental Shelf." *Id.* at 1405. "We reject

the notion that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of [the statute] as 'Federal lands' 'situated in Alaska.'" *Id.* at 1405-06.

In the same manner, this Court should reject the EPA's determination that the term "such area" in section 404(c), which clearly means the site in question, *i.e.*, Sweedens Swamp, can be read to mean the geographic region of all of Massachusetts and/or the country at large.

Since it is undisputed that the EPA's consideration of the cumulative and historical loss of wetlands in places other than Sweedens Swamp was "important" to its finding that there would be "unacceptable adverse effects" on wildlife--which is the ultimate finding required by section 404(c)--and since that extraneous consideration was in *excess* of EPA's statutory authority and jurisdiction, this Court must reverse the lower court and order it to vacate the agency's decision. This result obtains even if this Court should reject Bersani's petition on the issue of whether there was a practicable alternative site on which to build the mall. This is so because the EPA expressly stated that *both* reasons, *i.e.*, the avoidability of the loss *and* the cumulative impact of losses of wetlands generally other than at the proposed site, together constituted the basis for vetoing the fill permit. Consequently, if any of the two reasons were improperly considered, the EPA could decide that the one reason standing alone would be insufficient grounds upon which to base its veto of the permit. Obviously, if both reasons were improperly considered, and we believe that they were (based upon the arguments in this petition as well as the petition of Bersani, *et al.*, and the dissenting opinion of Chief Judge Pratt), then the EPA would have no choice but to issue the permit.

CONCLUSION

The issue raised by this petition is a serious one dealing with the fundamental role of the federal courts in determining what the law is, not what it should be. Congress clearly limited the EPA's veto authority of a permit to considering the environmental effects of any fill at the proposed site in question. Never before has the EPA claimed such a broad expanse of authority as it has in this case. If this decision is not overturned, the EPA will be allowed by the courts rather than by Congress to exercise unlimited discretion in vetoing any of the 11,000 permit applications filed each year on the grounds that in its view, enough wetlands have already been filled in. In such a case, Congress' express desire to balance environmental consideration with responsible economic development in the permitting process will have been thwarted.

Respectfully submitted,

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